IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE

WRIT PETITION NO. 983 OF 2007

Pandurang Kathod Kotkar & ors.... Petitioner

versus

Smt. Taibai Atmaram, Patil & ors..... Respondent.

Shri R.B. Paranjape for the petitioner.
Shri R.S.Datar for respondents 1 to3.

CORAM; A.P. DESHPANDE, J.
DATED; 9TH JULY, 2007

P.C.;

1. Rule. Rule made returnable forthwith. Taken up for final hearing by consent of parties.

2. One Yamunabai Kathod Kotkar expired on 15-8-1984. The present petitioners 1 and 2 are the sons of the deceased who filed Misc. Application No.780/94 in the Court of Jt. CJJD Thane for obtaining a Heirship Certificate. The trial court issued heirship certificate in favour of the petitioner nos.1 & 2. The certificate was issued on 2-2-1995. It is the case of the present petitioners that the respondents were impleaded as party respondents before the Jt. CJJD in Misc. Application No.780/94. On consent being accorded by the respondent, the heirship certificate was issued. According to the petitioners,

after a lapse of about 9 years belatedly in 2004, the respondents filed a Misc. Application No.287/04 seeking revocation of the heirship certificate granted in Misc. application No.780/94. According to the present petitioners, the heirship certificate was granted under sec. 1 & 2 of Bombay Regulation Act whereas according to the respondent the heirship certificate has been issued under Indian Succession Act.

2. In Misc. Civil Application No. 287/04 the present petitioners moved an application for framing of a preliminary issue touching the objection regarding the application being barred by limitation. The trial court allowed the application and directed framing of preliminary issue in regard to limitation. At a later point of time the respondent raised an objection that the preliminary issue under sec. 9 (A) can only be framed in a suit and the present proceeding being in the form of an application, sec. 9(A) has no applicability thereto. As such the respondent prayed for deleting the said issue as a preliminary issue. The trial court has allowed the application moved by the respondent and deleted the preliminary issue. Both the learned counsel appearing for respective parties state that now the trial is at the stage of framing of issue. Both the learned

counsel agree that the issue in regard to limitation in filing of Misc. application No.287/04 can be framed and tried along with other issues. as the question of limitation involved a mixed question of facts and law. I deem it appropriate to direct the trial court to frame issue in regard to the limitation as one of the issue and try it along with other issues. Both the learned counsel agrees to the course which I propose to adopt. In the result, I direct the trial court to frame issue in regard to the limitation as one of the issues along with other issues and to proceed with the Misc. Civil application and to decide the application as expeditiously as possible and preferably within a period of four months from today. Rule made absolute in above terms.

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